TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 191.

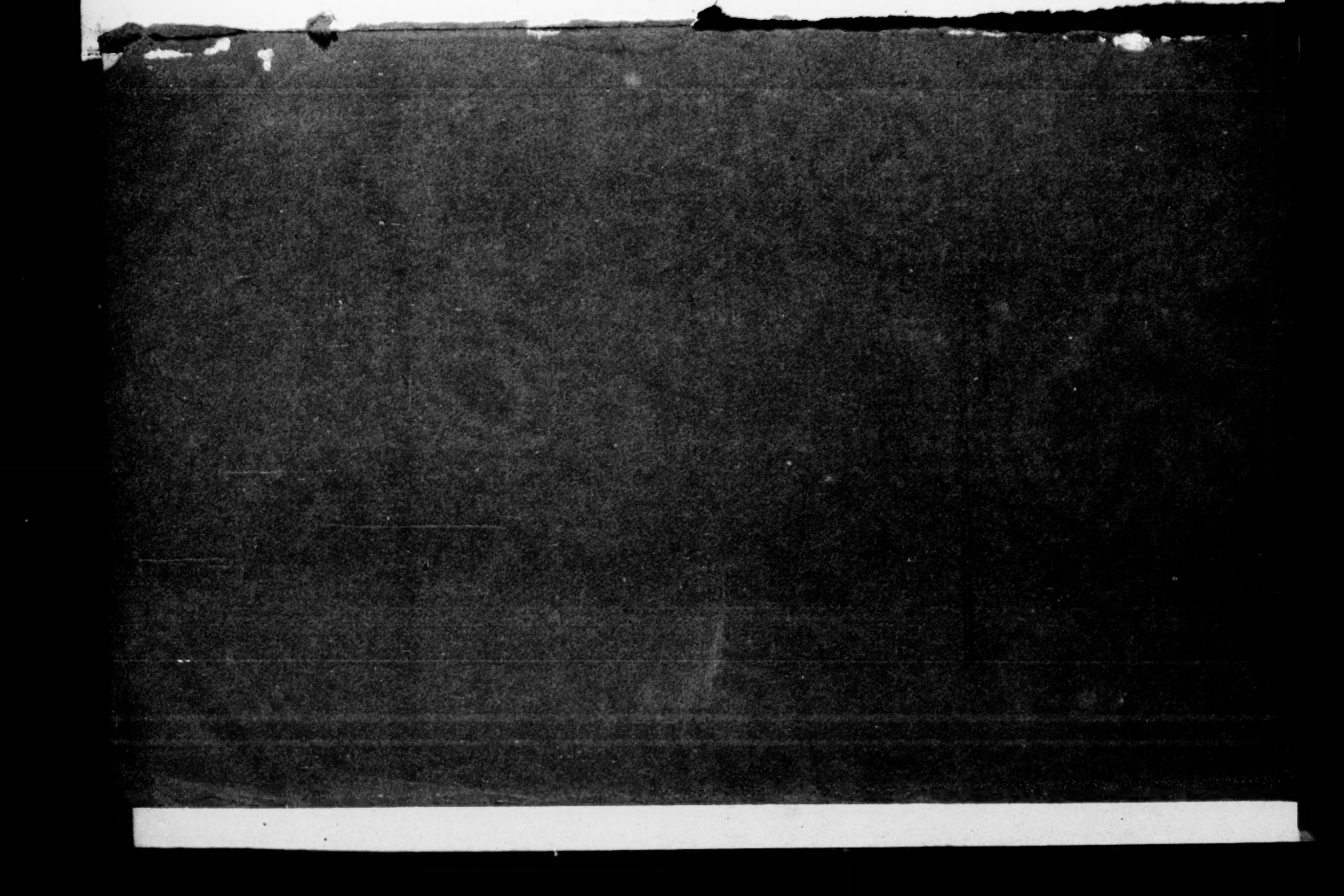
SILAS M. WAITE, PLAINTIFF IN ERROR,

vs.

GEORGE S. DOWLEY, TREASURER OF THE TOWN OF BRATTLEBORO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

FILED OCTOBER 19, 1874.



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1 STATE OF VERMONT, *Windham, ss:*

Pleas before the honorable county court begun & held at Newfane, within & for the county of Windham aforesaid, on the second Tuesday, being the tenth day of September, A. D. 1872.

Present: Hon. James Barrett, presiding judge; Hon. Ezra Butterfield, Hon. Fernando S. Howard, assistant judges.

GEORGE NEWMAN, TREASURER OF THE TOWN of Brattleboro',
v.
SILAS M. WAITE.

Be it remembered that at the term of this court begun & held at Newfane, in said county, on the second Tuesday of April, A. D. 1870, George Newman, of Brattleboro', in said county, as treasurer of said town of Brattleboro', brought his action against Silas M. Waite, of the
2 same Brattleboro', and declared against him, in a plea of trespass on the case to recover the forfeiture in each of the years 1866 & 1867 imposed by the statute of this State passed in the year of 1865, for his failures as cashier of the First National Bank of Brattleboro' to return to the town clerk of said town of Brattleboro' lists of the shareholders of said bank according to the requirements of said statute, demanding in damages the sum of two thousand dollars, as by said plaintiff's writ on file more fully and at large appears. And said action being duly entered in court, the said plaintiff appears by Charles N. Davenport, esquire, his attorney, to prosecute the same, and the defendant aforesaid comes, by James M. Tyler, esquire, his attorney, and said case is continued under the rules of this court until the next term of
3 this court, and so from term to term until the present term of this court, held at Newfane aforesaid, on the second Tuesday of September, A. D. 1872.

And now come the parties, by their respective attorneys aforesaid, and the defendant, for plea, says that he is not guilty in manner & form as the plaintiff in his declaration has alleged, and thereof puts himself on the country; and the plaintiff doth the like. And thereupon the jurors, to wit, Moses C. Skinner, Nelson Winslow, Isaac B. Puffer, Samuel P. Miller, James E. White, Josiah A. Brown, Joseph Morse, Ira O. Haven, Henry Page, Asa Burnap, Estus E. Sargeant, & H. O. Nand, good & lawful men, *and* are duly empannelled & sworn to try said issue between said parties, who, upon their oaths, say that the defendant is guilty in manner & form as the plaintiff in his declaration has alleged, and find for the plaintiff to recover eleven hundred & fifty dollars damages.
4 Whereupon it is considered by the court here that the plaintiff recover of the defendant his damages so f'und by said jury, the sum of eleven hundred & fifty dollars, and his costs, taxed at the sum of fifty-nine dollars & fifty-two cents, whereof he may have execution.

And now comes the defendant and files his exceptions to said judgment in matter of law, as by said exceptions on file more fully & at large appear, and prays that said exceptions be allowed, and said case may pass to the supreme court at its next term for said county for revision, and the court here doth allow said exceptions, & doth order said case to pass to the supreme court next to be held in & for said county for

revision in matters of law, & doth order said execution to be stayed until the determination of said supreme court.

A true copy of record. Attest:

R. TYLER, *Clerk.*

5 STATE OF VERMONT,
Windham County, ss:

To any sheriff or constable in the State, greeting:

By the authority of the State of Vermont, you are hereby commanded to attach the goods, chattels, or estate of Silas M. Waite, of Brattleboro', in the county of Windham, to the value of two thousand dollars, and him notify thereof according to law, and him summon to appear before the county court next to be held at Newfane, within and for said county of Windham, on the second Tuesday of April, 1870, then and there in said court to answer unto George Newman, treasurer of the town of Brattleboro', who brings this suit in his capacity of treasuer, for the benefit of said town of Brattleboro', in the county of Windham. In a plea of trespass on the case for that whereas, heretofore, to wit, on the 9th day of November, A. D. 1865, the general assembly of the State of Vermont, with the approval of the governor thereof, duly enacted a certain statute law, entitled "An act providing for taxing bank-
6 stock in the several banking associations in this State, formed under the acts of Congress, approved June 3, 1864, entitled 'An act to provide a national currency,'" the first, third, and fifth sections of which said statute law are in the words and figures following, that is to say:

"SEC. 1. It shall be the duty of the cashiers of the several banking associations in this State formed under the act of Congress approved June 3, 1864, entitled 'An act to provide a national currency,' and the cashiers of all other banks in this State, to transmit to the clerks of the several towns in this State, in which any stock or share holder of such banking association shall reside, a true list of the names of such stock or share holders, with the number of shares standing against the name of each stock or share holder on the books of such banking association, together with the amount of money actually paid in on each share, on the first day of April in each year hereafter, on or before the fifteenth day of April in each year."

7 "SEC. 3. If any of the stock of such banking associations is owned by, or stands in the name of, any person residing out of this State, it shall be the duty of the cashiers of such banking associations to transmit to the clerk of the town in which such banking association is situated the names of all such non-resident stock or share holders, with the number of shares standing against the name of each of such stock or share holder on the books of such banking association, together with the amount of money actually paid in on each share, on or before the fifteenth day of April in each year.

"SEC. 5. If any cashier shall neglect or refuse to make returns to any towns in this State as provided in this act, he shall forfeit and pay to the treasurer of such town, for the benefit of such town, the sum of five hundred dollars, to be recovered by an action on the case, in the name of such treasurer, founded on this statute."

And the plaintiff avers that the said Silas M. Waite was on the first day of April, A. D. 1866, and for a long time before had, and ever since

has been, the cashier of a certain banking association, formed
8 and organized under the act of Congress aforesaid, known and called by the name of the First National Bank of Brattleboro', located and doing business at Brattleboro', in said county.

And the plaintiff further avers that there were residing in the town of Brattleboro', on said first day of April, A. D. 1866, a large number of persons who were then stockholders or shareholders in said First National Bank of Brattleboro', and a large number of other persons who, on said first day of April, A. D. 1866, resided without the State of Vermont, and were then stock or share holders in said bank, which said persons so residing in said Brattleboro', and without the State of Vermont, owned shares or stock in said bank to the amount of one hundred and fifty thousand dollars, all which was well known to the said defendant. And it then and there became and was the duty of the said defendant, so being the cashier of said First National Bank of Brattleboro', as aforesaid, on or before the 15th day of April, A. D. 1866, to transmit to the clerk of said
9 town of Brattleboro', a true list of the names of such stock or share holders who were then resident in said Brattleboro', with the number of shares standing against the name of each stock or share holder on the books of the said First National Bank of Brattleboro' on the first day of April, A. D. 1866, together with the amount of money actually paid in on each share, and also the names of all such persons residing out of the State of Vermont who, on the first day of April, A. D. 1866, were stock or share holders in said bank, with the number of shares standing against the name of each of such stock or share holders on the books of said First National Bank of Brattleboro', together with the amount of money actually paid in on each share; yet the said defendant, not regarding his duty in that behalf, did not, on or before the 15th day of April, A. D. 1866, make returns to the clerk of said town of Brattleboro', as provided by the first and third sections of the statute hereinbefore recited, but wholly neglected and refused so to do, contrary to the form
10 of the statute in such case made and provided. Whereby and by force of said statute an action hath accrued in favor of the plaintiff, treasurer of the town of Brattleboro', to have and recover of the said defendant, for the benefit of said town of Brattleboro', the sum of five hundred dollars, with interest thereon from the fifteenth day of April, A. D. 1866.

And in a further plea of trespass on the case, for that whereas, heretofore, to wit, on the first day of April, A. D. 1867, there was located and doing business in the town of Brattleboro', in said county of Windham, a certain banking association formed and organized under the act of Congress approved June 3, 1864, entitled "An act to provide a national currency," known and called by the name of the First National Bank of Brattleboro', of which said banking association the said defendant was on said first day of April, A. D. 1867, and for a long time before had, and ever since has been, the cashier; and the plaintiff avers
11 that on said first day of April, A. D. 1867, there were residing in said town of Brattleboro' a large number of persons who then were share or stock holders in said bank, and a large number of other persons residing without the State of Vermont who then were share or stock holders in said bank, and whose names then stood upon the books of said bank as such share or stockholders, the whole amount of such stock or shares in said bank, in money actually paid in, then being, as the plaintiff avers, the sum of one hundred and fifty thousand dollars, and it then and there became and was the duty of the said defendant, so being the cashier of said First National Bank of Brattleboro', as aforesaid, pursuant to the provisions of a certain statute law of this State,

in the first count of this declaration particularly stated and set forth, on or before the 15th day of April, A. D. 1867, to transmit to the clerk of said town of Brattleboro' a true list of the names of such stock or share holders who were then resident in said town of Brattleboro',
12 with the number of shares standing against the name of each stock or share holder on the books of said First National Bank of Brattleboro', on the first day of April, A. D. 1867, together with the amount of money actually paid in on each share, and also the names of all such persons residing out of the State of Vermont who, on the first day of April, A. D. 1867, were stock or share holders in said bank, with the number of shares standing against the name of each of such stock or share holders on the books of said bank, together with the amount of money actually paid in on each share; yet the said defendant, well knowing the premises, not regarding his duty in that behalf, did not on or before the 15th day of April, A. D. 1867, or at any other time, transmit to the clerk of said town of Brattleboro' a true list of the names of the stock or share holders of said First National Bank of Brattleboro' who were on said first day of April, 1867, residing in said
13 town of Brattleboro', with the number of shares standing against the name of each stock or share holder on the books of said bank, together with the amount of money actually paid in on each share; nor did the said defendant transmit to the clerk of said town of Brattleboro', in which the said First National Bank of Brattleboro' was located and situated, the names of all such non-resident stock or share holders, with the number of shares standing against the name of each of such stock or share holders on the books of said bank, together with the amount of money actually paid in on each share, but wholly neglected and refused so to do, contrary to the form of the statute in such case made and provided, whereby, and by force of the statute in such case made, an action hath accrued in favor of the plaintiff, as treasurer of the town of Brattleboro', to have and recover of the said defendant, for
14 the benefit of said town, the sum of five hundred dollars, with interest thereon from the 15th day of April, A. D. 1867.

And in a further plea of trespass on the case, for that whereas, heretofore, to wit, on the first day of April, A. D. 1868, there was situated and doing business in the town of Brattleboro', in said county of Windham, a certain banking association formed and organized under the act of Congress approved June 3, 1864, entitled "An act to provide a national currency," known and called by the name of the First National Bank of Brattleboro', of which banking association the said defendant was, on said first day of April, A. D. 1868, and for a long time before, had, and ever since has been, the cashier; and the plaintiff avers that on said first day of April, A. D. 1868, there were residing in said town of Brattleboro' a large number of persons who then were stock or share holders in said bank, and a large number of other persons residing with-
15 out the State of Vermont who then were stock or share holders in said bank, and whose names then stood upon the books of said bank as such stock or share holders, the whole amount of which stock or shares of value in said bank, in money actually paid in, then being, as the plaintiff avers, the sum of one hundred and fifty thousand dollars; and it then and there became and was the duty of the said defendant, so being the cashier of said bank as aforesaid, pursuant to the provisions of a certain statute law of this State, in the first count of this declaration particularly stated and set forth, on or before the 15th day of April, A. D. 1868, to transmit to the clerk of said town of Brattleboro' a true list of the names of such stock or share holders who were then resi-

dent in said town of Brattleboro', with the number of shares standing against the name of each stock or share holder on the books of said bank on the first day of April, A. D. 1868, together with the
16 amount of money actually paid in on each share, and also the names of all such persons residing out of the State of Vermont who, on the first day of April, 1868, were stock or share holders in said bank, with the number of shares standing against the name of each stock or share holder on the books of said bank, together with the amount of money actually paid in on each share; yet the said defendant, not regarding his duty in that behalf, did not, on or before the 15th day of April, A. D. 1868, or at any other time, transmit to the clerk of said town of Brattleboro' a true list of the stock or share holders of said bank who were on said first day of April, A. D. 1868, residing in said town of Brattleboro', with the number of shares standing against the name of each stock or share holder on the books of said bank, together with the amount of money actually paid in on each share, nor did the said defendant transmit to the clerk of said town of Brattleboro', in which the said First National Bank of Brattleboro' was
17 located, the names of all such non-resident stock or share holders, with the number of shares standing against the name of each of such stock or share holder on the books of said bank, together with the amount of money actually paid in on each share, but wholly neglected and refused so to do, contrary to the form of the statute in that behalf made and provided, whereby, and by force of the statute in the first count of this declaration recited, an action hath accrued in favor of the plaintiff, as treasurer of the town of Brattleboro', to have and recover of the said defendant, for the benefit of said town, the sum of five hundred dollars, with interest thereon from the 15th day of April, A. D. 1868, all which is to the damage of the plaintiff, as such treasurer, as he says, the sum of two thousand dollars, for the recovery of which, with just costs, the plaintiff brings suit.

Fail not, but make service and return according to law.

Dated at Brattleboro', in the county of Windham, this 28th day
18 of March, A. D. one thousand eight hundred and seventy.

SAM. L. HUNT,
Justice of the Peace.

Charles N. Davenport recognized to the defendant in the sum of fifteen dollars as surety for costs of prosecution, as the law directs, before me.

SAM. L. HUNT,
Justice of the Peace.

(Endorsed:) The within writ was exhibited to and signed by me on the 29th day of March, A. D. 1870.

SAM. L. HUNT.

STATE OF VERMONT,
Windham County, ss:

At Brattleboro', on the 31st day of March, A. D. 1870, by virtue of the within writ, I attached, as the property of defdt., all the real estate in the town of Brattleboro'. On the same day I left in the town clerk's office in said Brattleboro' a true copy of this attachment, with a description of the estate attached, & this my return hereon thereon endorsed.
19 On the same day I delivered to defendant, Silas M. Waite, a true and attested copy thereof, with this my return hereon thereon endorsed. Fees, .

S. N. HERRICK, *Shff.*

20 GEORGE NEWMAN, TREAS'R OF TOWN of Brattleboro',
v.
SILAS M. WAITE.

In this case the jurors, upon their oaths, say that the defendant is guilty in manner and form as the plaintiff in his declaration has alleged, and find for the plaintiff to recover eleven hundred and fifty dollars damages.

MOSES C. SKINNER,
Foreman.

21 Windham County court, September term, 1872.

GEORGE NEWMAN, TREASURER OF THE TOWN of Brattleboro',
vs.
SILAS M. WAITE.
} Exception.

This is an action brought to recover the forfeiture of $500 in each of the years 1866 and 1867, under the act of the legislature of this State, passed in the year 1865, on the ground that the defendant, as cashier of the First National Bank of Brattleboro', did not in those years make returns to the clerk of said town of lists of stockholders in said bank, as is required by said act. The plff.'s declaration is referred to. Plea, the general issue and trial by jury.

The plff. offered evidence to show, and the defdt. conceded, that in the years 1866 and 1867 he made no returns to the clerk of said town of Brattleboro' as required by said act of 1865, whereupon the plaintiff rested his case.

The defdt.'s counsel claimed, in defence, that, as said bank was
22 organized under said law of Congress referred to in the plff.'s declaration, the defdt., as such cashier, was amenable to no law but said law of Congress, and that the State legislature had not power to prescribe or define his duties as such cashier.

The defdt. offered evidence tending to show that at all times in the years 1866 and 1867 said bank kept such lists of the stockholders in said bank, as is required by said law of Congress, which lists were at all times open to the inspection of the listers of said town, who were permitted at all times in those years to transcribe therefrom and set in the grand list of said town all such stock of said bank as they deemed taxable.

The defdt. further offered evidence tending to show that in the month of April, 1866, the listers of said town called at said bank, and, with the defdt.'s permission and aid, transcribed from said lists of said bank, and set in the grand lists of said town for that year, all the stock of said bank that was subject to taxation in said town, and the same was
23 duly taxed, so that said town in that year suffered no damage by reason of the defdt.'s omission to make such return that year to the clerk of said town.

The defdt. also offered evidence tending to show that in April, 1867, the listers of said town in like manner transcribed and set in the grand list of said town for that year all the stock of all the shareholders in said bank who were residents of said town on the first day of April in that year, and that the same was duly taxed, and that said listers might have transcribed and set in said grand list in like manner the stock of shareholders in said bank who were non-residents of this State on the first day of April in that year, but omitted to do so at their own option.

The plff.'s counsel waived all objection to the admission of the evidence offered under the general issue, but claimed that if admitted it constituted no legal defence to said action.

The court thereupon (the defendant, on leave being granted to
24 except, consenting) pro forma directed a verdict to be taken for the plff., and it was so done and referred to.

To which defendant excepted. Exceptions allowed. Exn. stayed, and cause passed to the Supreme Court.

JAMES BARRETT,
Pres'g Judge.

STATE OF VERMONT,
Windham County, Clerk's Office:

I, Royner Tyler, clerk of Windham County court, hereby certify that the foregoing are true copies of the records in my office remaining.

Witness my hand & the seal of said court this 24th day of September, A. D. 1874.

[SEAL.] ROYNER TYLER, *Clerk.*

25 STATE OF VERMONT,
Windham, ss:

Pleas before the honorable supreme court for the State of Vermont, begun & held at Newfane, in & for said county of Windham, on the first Monday following the second Tuesday next after the fourth Tuesday of January, A. D. 1874, being the 16th day of February, A. D. 1874.

Present, Hon. John Pierpoint, chief-justice; Hon. Hugh H. Wheeler, Hon. Timothy P. Redfield, Hon. Jonathan Ross, associate judges.

GEORGE S. DOWLEY, TREASURER OF THE county of Brattleboro',
v.
SILAS M. WAITE.

Be it remembered that at the term of this court begun and held at Newfane, in and for said county of Windham, on the 17th day
26 of February, A. D. 1873, Silas M. Waite, of Brattleboro', in said county, brought into this court the case of George Newman, of the same Bratt'boro', as treasurer of said town of Brattleboro', plaintiff, against him, the said Silas M., defendant, by way of exceptions to the judgment rendered by the county court of said county at its September term, A. D. 1872, in favor of the plaintiff against said defendant, as by copies of the record of said county court and of the defendant's said exceptions more fully and at large appear.

And said case being duly entered in this court, said town of Brattleboro' appears by Charles N. Davenport, esquire, its attorney, and the defendant comes by James M. Tyler, esquire, his attorney, and said town of Brattleboro' shows to the court how that George Newman, treasurer of said town of Battleboro', departed this life since the rendition of said judgment of said county court, and that George S. Dowley, of the
27 same Brattleboro' has been duly appointed treasurer of said town of Brattleboro' in the stead of said George Newman, deceased, & moves the court that leave be granted to said Dowley, as such treasurer, to appear & prosecute said case; and the court here, with the consent of the defendant, grants such leave as prayed for, and said George S. Dowley, as such treasurer, appears accordingly, by Charles N. Davenport, esquire, his attorney.

And said exceptions are read, and the argument of counsel learned in the law, as well on behalf of the defendant, the excepting party, as on the part of plaintiff, are heard. And because the court wishes to advise what judgment to render in the premises, it is ordered by the court that the case be continued to the next term of this court, to be held at
28 Newfane aforesaid on the 16th day of February, A. D. 1874.

And now, at said last-mentioned term of said , come the parties by their respective attorneys aforesaid; and the court here having heard the said exceptions & arguments aforesaid, and being fully advised relative thereto, doth consider that the said defendant take nothing by his exceptions, and that said judgment of said county court be, and the same is, in all things affirmed, and that the plaintiff recover of the defendant the damages assessed & found by the jury aforesaid, with interest, amounting, in the whole, to the sum of twelve hundred & forty-seven dollars & seventy-five cents, and in costs in the county court, together with his costs in this court, amounting, in the whole, to the sum of one hundred & eight dollars & forty-seven cents, whereof he may have execution.

A true copy of record.

Attest:

R. TYLER, *Clerk.*

29 STATE OF VERMONT,
Windham, ss:

OFFICE OF CLERK OF THE SUPREME COURT.

On the 6th day of March, A. D. 1874, a writ of error to the Supreme Court of the United States is filed in the case, with the petition for the same and notice to the defendant in error, all of which are hereto annexed.

Attest:

R. TYLER, *Clerk.*

STATE OF VERMONT,
Office of Clerk of Supreme Court of Windham County:

I, Royner Tyler, clerk of the supreme court for the county of Windam, hereby certify that the foregoing are true copies from the records in my office remaining.

Witness my hand & the seal of said supreme court this 24th day of September, A. D. 1874.

[SEAL.] ROYNER TYLER,
Clerk.

30 Supreme Court of the United States, in error.

SILAS M. WAITE, PLAINTIFF IN ERROR,
vs.
GEORGE S. DOWLEY, TREASURER OF THE town of Brattlebor', defendant in error.

The petition of Silas M. Waite, of Brattleboro', in the county of Windham, in the State of Vermont, plaintiff in error in the above-entitled cause, respectfully shows to your honor that heretofore, and on or about the 28th day of March, A. D. 1870, George Newman, of said Brattleboro', who was then the treasurer of said town of Brattleboro', commenced an action at law in his favor, as such treasurer, against the said Waite, plaintiff in error, returnable to the April term, 1870, of the county court for said

county of Windham, and duly entered said action in said court at said term; and such proceedings were therein had that said cause was
31 duly continued in said county court from term to term until the September term thereof, A. D. 1872, when, issue having been duly joined therein, the same cause came on to be tried; and upon said trial it appeared, as by the record in said suit, to which your petitioner prays leave to refer, will fully appear, that the same was brought and prosecuted for the recovery from the plaintiff in error of certain penalties or forfeitures prescribed by the fifth section of an act entitled "An act providing for taxing bank-stock in the several banking associations in this State, formed under the act of Congress approved June 3, 1864, entitled 'An act to provide a national currency,'" passed by the legislature of the State of Vermont at the session thereof holden in October, 1865, for an alleged failure, on the part of the said plaintiff in error, to comply with the requirements and provisions of the first section
32 of the act, and for no other purpose or cause of action, which said first section of said act is as follows:

"SEC. 1. It shall be the duty of the cashiers of the several banking associations in this State formed under the act of Congress approved June 3, 1864, entitled "An act to provide a national currency," and the cashiers of all other banks in this State, to transmit to the clerks of the several towns in this State, in which any stock or share holders of such banking association shall reside, a true list of the names of such stock or share holders, with number of shares standing against the name of each stock or share holder on the books of such banking association, together with the amount of money actually paid in on each share on the first day of April in each year hereafter, on or before the fifteenth day of April in each year."

And the said fifth section of said act, imposing a penalty or forfeiture for the non-performance of the duties prescribed in the
33 first section of said act, is as follows:

"SEC. 5. If any cashiers shall neglect or refuse to make returns to any towns in this State as provided in this act, he shall forfeit and pay to the treasurer of such town, for the benefit of such town, the sum of five hundred dollars, to be recovered by an action on the case, in the name of such treasurer, founded on this statute."

Your petitioner further shows your honors that on the trial of said cause there was drawn in question the validity of said first and fifth sections of said act, as being in conflict with the Constitution of the United States, and repugnant to the laws of Congress relating to banking passed the 3d day of June, 1864, and it was on said trial claimed by the plaintiff in error in his defence that the said act of the legislature prescribing and defining the duties of said cashier in said first section as aforesaid, and imposing a penalty or forfeiture for non-
34 observance of such duties as aforesaid, was null and void, and that no law or power existed authorizing the State authorities to assess for taxation the shares in national banks. And such proceedings were had in said cause in said court that the said claim and defence of the plaintiff in error were by said court over'uled. And it was then and there decided by said court that the said act was valid, and was not repugnant to the Constitution or laws of the United States, and that the plaintiff in said suit was entitled to recover therein the said penalties sued for from the plaintiff in error. And thereupon, and in consequence of said ruling and decision, a verdict was rendered against the plaintiff in error for the amount of said penalties and costs. And the plaintiff in error duly excepted to such decision and ruling. And

said exceptions having been duly allowed, said cause afterwards passed to the supreme court of the State of Vermont for hearing upon
35 said exceptions, and in review of said decision, and was duly entered in said supreme court, at a session thereof, in said county of Windham, begun and holden on the 17th day of February, A. D. 1873, at which session of said supreme court the death of said George Newman, treasurer as aforesaid, was suggested, and George S. Dowley, his successor as said treasurer, was admitted by said court to prosecute said action. And thereupon said action was heard in said court at the said February term thereof, A. D. 1873. And in said hearing there was again drawn in question the validity of said act of 1865 of the legislature of Vermont, on the ground of its being unconstitutional and repugnant to the laws of Congress relating to banking, passed June 3, 1864, and, as therefore not being valid, to authorize the State authorities to assess the shares of national banks for taxation. And thereupon the said supreme court continued said cause for advisement until the February term of said court, A. D. 1874, at which said term of said court, to wit, on the 23d day of February, A. D. 1874, the de-
36 cision of said supreme court in said cause was adverse to the said defense set up by your petitioner and in favor of the validity of said State law, and deciding that it was not in violation of the Constitution of the United States or repugnant to the laws of Congress; and that the State authorities were authorized to assess the shares in national banks; and affirming the judgment of the said county court in said cause for the sum of eleven hundred and fifty dollars damages, with interest thereon from September term of said county court, A. D. 1872, together with the taxable costs.

Your petitioner further shows that said supreme court is the highest court in the State of Vermont in which a decision could be made, and that final judgment against him has been rendered by said court in said cause as aforesaid.

Your petitioner avers that manifest error hath occurred in the
37 said decision and judgment, to the great damage of your petitioner, to correct which error a writ of error hath duly issued from the clerk of the circuit court of the United States for the district of Vermont, under the seal of said circuit court, which writ of error was placed on file in the office of the clerk of said supreme court, where said decision was made, within ten days after the entry of judgment in said cause, together with a copy of said writ of error, duly certified, for said Dowley, the defendant in error, in order that the said judgment may be superseded.

Your petitioner further shows your honor that he herewith hands to your honor a bond, with sufficient surety, for damages, costs, and interest, to be approved by your honor as the law of Congress requires in a case of supersedeas, and prays that your honor will issue a citation to said George S. Dowley, treasurer as aforesaid, defendant in error, commanding him to appear at the Supreme Court of the
38 United States to be holden at Washington on the second Monday of October, A. D. 1874, pursuant to the writ of error filed in the clerk's office as aforesaid.

March 5, 1874.

SILAS M. WAIT.

FIELD & TYLER,
Att'ys for Pet'r.
J. PIERPOINT,
Chief Judge Supreme Court, Vt.

38½ (Indorsed:) Silas M. Waite, plff. in error, vs. Geo. S. Dowley. Petition. March 6, 1874. Filed. R. Tyler, clk. sup. court.

39 THE UNITED STATES OF AMERICA, *ss:*

To George S. Dowley, treasurer of Brattleboro', in the county of Windham and State of Vermont, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Vermont, wherein Silas M. Waite is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error aforesaid, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John Pierpoint, chief-justice of the supreme court of the State of Vermont, this 6th day of March, A. D. 1874.

J. PIERPOINT,
Chief-Justice of the Supreme Court, State of Vermont.

40 On this 6th day of March, A. D. 1874, personally appeared Frederick A. Nash before me, the subscriber, and makes oath that he delivered a true copy of the within citation to George S. Dowley, the defendant in error, named in said citation.

FREDERICK A. NASH.

Subscribed & sworn to this 6th day of March, A. D. 1874.

ROYNAL TYLER,
U. S. Comr., Dist. Vt.

I hereby authorize Fredrick A. Nash, of Brattleboro', Vt., to serve and return this citation.

GEO. P. FOSTER,
U. S. Marshal, Vermont District.

(Indorsed:) Citation. Mch. 6, 1874. Filed. R. Tyler, clerk sup. ct.

41 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the supreme court of the State of Vermont, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law in the said State in which a decision could be had in the said suit between George S. Dowley, treasurer of the town of Brattleboro', defendant in error, and Silas M. Waite, plaintiff in error, wherein was drawn in question the validity of a statute of the said State, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of such its validity, a manifest error hath happened, to the great damage of the said Silas M. Waite, as by his complaint appears, we being
42 willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings

aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the
43 said Supreme Court, the 6th day of March, in the year of our Lord one thousand eight hundred and seventy-four.

MORRISON R. WAITE,
Chief-Justice.

Attest:
[SEAL.]

B. B. SMALLEY,
Clerk of the Circuit Court of the United States for the District of Vermont.

D. A. SMALLEY,
Judge of the United States District Court for the District of Vermont.

(Indorsement on cover:) No. 191. Silas M. Waite, plaintiff in error, vs. George S. Dowley, treasurer of the town of Brattleboro'. Vermont supreme court. Filed 19th October, 1874.

Supreme Court of the United States,

OCTOBER TERM, 1876.—191.

SILAS M. WAITE,

Plaintiff in Error,

vs.

GEORGE S. DOWLEY,

Treasurer of the Town of Brattleboro.

BRIEF FOR THE PLAINTIFF IN ERROR.

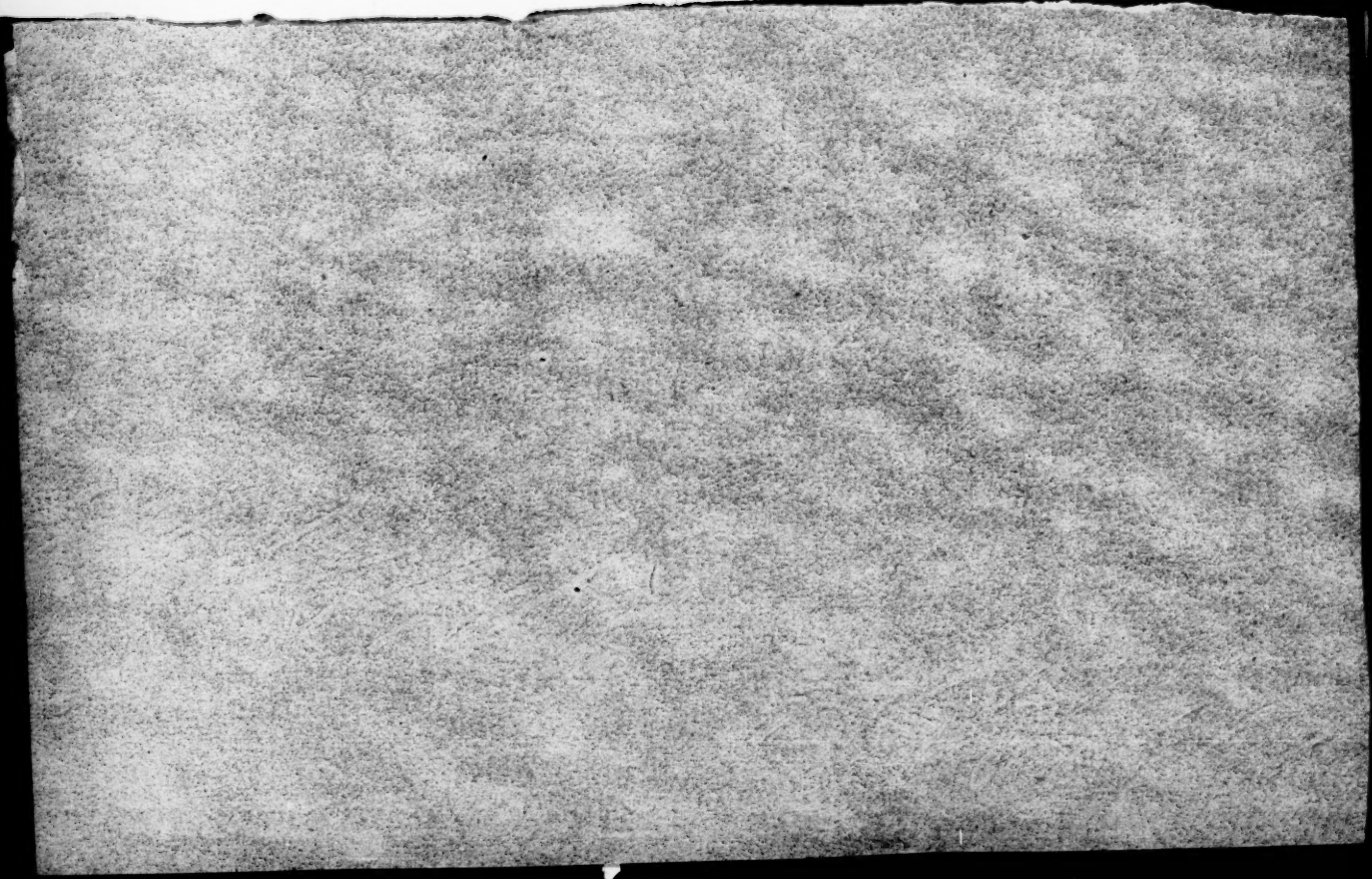
E. J. PHELPS,

Counsel.

NEW YORK:

EVENING POST STEAM PRESSES, 208 BROADWAY, CORNER FULTON STREET.

1877.



EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1876.

SILAS M. WAITE,
Plaintiff in error,

vs.

GEORGE S. DOWLEY, TREASURER OF
the town of Brattleboro.

No. 191.

Brief for the Plaintiff in Error.

Statement of the Case.

On the 9th of November, 1865, the Legislature of Vermont passed the following act. (*Acts of* 1865, *p.* 17.)

"An act providing for taxing stock in the several banking associations in this State, formed under the Act of Congress approved June 3, 1864, entitled "An Act to provide a national currency."

Sec. 1. "It shall be the duty of the cashiers of the several banking associations in this State, formed under

the Act of Congress approved June 3, 1864, entitled 'An Act to provide a national currency,' and the cashiers of all other banks in this State, to transmit to the clerks of the several towns in this State, in which any stock or shareholders of such banking association shall reside, a true list of the names of such stock or shareholders on the books of such banking association, together with the amount of money actually paid in on each share, on the first day of April in each year hereafter, on or before the 15th day of April in each year."

Sec. 2. "The stock and shares of all such banking associations shall be set in the list and taxed in the same manner that the stock in the several banks in this State, which are chartered under the authority of this State, are liable to be taxed by the existing laws thereof."

Sec. 3. "If any of the stock of such banking associations is owned by, or stands in the name of, any person residing out of this State, it shall be the duty of the cashier of such banking association to transmit to the clerk of the town in which such banking association is situated, the names of all such non-resident stock or shareholders, with the number of shares standing against the name of each of such stock or shareholders on the books of such banking association, together with the amount of money actually paid in on each share, on or before the 15th day of April in each year."

Sec. 4. "Whenever the collector in any town in which any such banking association is situated, shall have a tax against any stock or shareholder in such banking association who is not a resident of this State, it shall be the duty of the cashier of such banking association upon presentation of such tax to him by such

collector, to pay the same and charge the same to such stock or shareholder on the books of such banking association, and all dividends due and becoming due upon the same shall be holden to such banking association for the payment of such tax."

Sec. 5. "If any cashier shall neglect or refuse to make returns to any town in this State, as provided in this act, he shall forfeit and pay to the treasurer of such town for the benefit of such town, the sum of five hundred dollars, to be recovered by an action on the case, in the name of such treasurer, founded on this statute."

This action was brought in March, 1870, in the County Court of Windham county, Vermont, by the defendant in error, as treasurer of the town of Brattleboro, in Vermont, against the plaintiff in error, as cashier of the First National Bank of Brattleboro, to recover the penalty given by the fifth section of the foregoing act, for the refusal of the plaintiff in error to make to said town of Brattleboro the returns provided for in the first section.

Upon the plea of the general issue, the cause was tried in the Windham County Court, at its September Term, 1872, before Mr. Justice Barrett, and a jury. On the trial, the fact that the plaintiff in error, as cashier of the First National Bank of Brattleboro, had refused to make the said returns, was conceded, and the only defense set up was, "that as said bank was "organized under the law of Congress referred to in "the plaintiff's declaration, the defendant, as such "cashier, was amenable to no law but said law of "Congress, and that the State Legislature had not "power to prescribe or define his duties as such cash-"ier." (*Record, p.* 6.)

The plaintiff in error also offered evidence tending to show, that at all times during the years in question, said bank kept such lists of its stockholders as the Act

of Congress requires, which lists were at all times open to the inspection of the trustees of said town, who were permitted at all times in these years to transcribe therefrom, and set in the grand list of said town all such stock of said bank as they deemed taxable.

That in the month of April, 1866, the trustees of said town called at said bank, and, with the defendant's permission and aid, transcribed from said lists of said bank, and set in the grand list of said town for that year, all the stock of said bank that was taxable in said town, and the same was duly taxed.

And that in April, 1867, said trustees in like manner transcribed and set in the grand list of said town for that year, all the stock of all the shareholders in said bank who were residents of said town on the first day of April in that year, (the day on which under the law of Vermont assessments for taxes are made), and the same was duly taxed. And that said trustees might have transcribed and set in said grand list in like manner the stock of shareholders in said bank who were non-residents of Vermont on said day, but omitted to do so at their own option.

The defendant in error waived all objection to the admission of the evidence under the general issue, but claimed that it constituted no defense.

The court thereupon, (the plaintiff in error, on leave being granted to except, consenting), *pro forma* directed a verdict for the plaintiff, which was taken for two penalties of $500 each, and interest thereon.

To this decision the defendant duly excepted, his exceptions were allowed, and the cause passed to the Supreme Court for review. (*Record, pp.* 6, 7, 8.)

At the February Term, 1873, of the Supreme Court of Vermont, the cause was argued upon the exceptions; and at the February Term, 1874, the court rendered a decision affirming the said judgment of the county court, and giving judgment for the defendant in error against the plaintiff in error, for $1,247.75 damages,

and $108.47 costs, being the amount of the verdict with subsequent interest. (*Record, p.* 8.)

The Supreme Court of Vermont is the highest court of law in that state.

The plaintiff in error thereupon brought this writ of error to the Supreme Court of the United States, claiming that the decision of the Supreme Court of Vermont drew in question the validity of a statute of that state, on the ground of its being repugnant to the constitution and laws of the United States, and that the decision was in favor of the validity of the statute. (*Record pp.* 9, 10.)

Assignment of Errors.

The plaintiff in error assigns for error in the decision complained of, that the Supreme Court of Vermont erred—

First, In holding that said statute hereinbefore recited was valid under the constitution of the United States, as not repugnant to, nor in conflict with the Acts of Congress providing for the organization and management of national banks, being the Acts of March 25, 1863, and June 3, 1864.

Second, In rendering judgment against the plaintiff in error for penalties provided by said statute of Vermont, said statute being invalid and void under the constitution of the United States, as repugnant to and in conflict with said Acts of Congress.

POINTS.

The plaintiff in error will rely upon the following points:

I.—That the statute of Vermont in question, is in conflict with the Acts of Congress referred to, and, therefore unconstitutional, because these acts, having prescribed the means and manner whereby the state authorities shall be furnished with the necessary information for purposes of taxation, the statute of Vermont undertakes to alter the provisions of the Acts of Congress on that subject, and to impose a new, different, and additional duty upon the banks and their officers, to be enforced by a penalty.

II.—That as the plaintiff in error is shown to have fully complied with the provisions of these Acts of Congress, whereby all the just requirements of the town of Brattleboro in the premises have been answered, he can not be made liable to a penalty imposed by a state statute, for a violation of provisions of that statute not authorized by the Acts of Congress, inconsistent therewith, and entirely unnecessary to the purposes of state taxation.

III.—That the statute of Vermont in question is further in conflict with the Acts of Congress referred to, because it requires the stock of the bank to be taxed in the town where the shareholders reside, instead of at the place where the bank is located.

IV.—That the judgment of the Supreme Court of Vermont should be therefore reversed.

I.—A long and uniform course of decision in this Court, has established the proposition upon which the case of the plaintiff in error rests. That in all cases where the state governments have a concurrent power of legislation with the national government, if Congress exercises its power upon the subject, that of the states is excluded. They can not enter upon the same ground, nor legislate for the same object.

Nor is it the question in such cases, whether the two statutes are in their operation necessarily repugnant or contradictory to each other. The state cannot legislate at all upon the subject, except so far as Congress may permit. When once Congress has acted upon it, that action becomes supreme, and all interfering legislation of the states, whether in aid of or in opposition to it, is suspended and prohibited.

It is, therefore, as much beyond the power of a state to impose a penalty for a non-compliance, as for a compliance, with the requirements of an act of Congress.

Houston vs. *Moore*, 5 *Wheaton*, 1.
McCulloch vs. *Maryland*, 4 *Ib.*, 316.
Osborn vs. *Bank of United States*. 9 *Ib.*, 738.
Weston vs. *Charleston*, 2 *Pet.*, 466.
Brown vs. *Maryland*, 12 *Wheaton*, 419.
Dobbins vs. *Erie Co.*, *Ib.*
Gilmore vs. *Philadelphia*, 3 *Wal.*, 713.
Ex parte McNeil, 13 *Ib.*, 240.
Bank of Commerce vs. *N. Y. City*, 2 *Black*, 620.
Farm. & Mech. Nat. Bank, vs. *Dearing*, 91 *U. S. Sup. Ct. Rep.* (1 *Otto.*), 29.

In the latter very recent case, Mr. Justice, SWAYNE, in delivering the opinion of the court, refering to the National banks, says :

"Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is an abuse, because it is the usurpation of power which a single state cannot give. Against the national will, the states have no power, by taxation or otherwise, to retard, impede, hinder, or in any manner control the operation of the constitutional laws enacted by Congress to carry into effect the powers vested in the general government." * * * * *

"Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the state retires, and lies in abeyance until a proper occasion for its exercise shall occur."

See also City of Pittsburgh vs. *First National Bank*, 55 *Penn.*, 45.

The principles thus established are directly applicable to the case at bar.

Congress has not only provided how, where, and to what extent shares in national banks may be taxed, but has likewise prescribed the means by which the state authorities shall obtain the requisite information, and the duty of the bank officers in furnishing it. The whole ground is therefore covered by Congressional legislation, the validity of which is not open to question.

The state legislature then interferes, and, for the purpose of effecting a taxation of the shares in a different place and in a different way from that authorized by Congress, imposes upon the bank a new duty in the premises, entirely different from that which the Act of Congress has prescribed, to be enforced by a penalty not provided by that act, and to be recovered by action in the state courts.

The effect of the Vermont statute is therefore to alter and extend, in material respects, the express provisions of the Act of Congress. And to impose a penalty upon the officers of the bank, for not discharging a duty which the Act does not require, in furtherance of a mode of taxation which it expressly prohibits.

II.—The force of these considerations becomes, if possible, still more apparent, when it is observed that the plaintiff in error fully performed in the premises the duty which the Act of Congress prescribes. And that thereby all the purposes of the town authorities were answered, and no injury whatever accrued from his refusal to comply with the requirement of the statute of Vermont.

III.—The Act of Congress of 1864 (*Sec.* 41), provides that the shares in the national banks shall be assessed "at the place where such bank is located and not elsewhere."

The Statute of Vermont in question (*Sec.* 2), directs that "the stock and shares of all such banking associations shall be set in the list and taxed in the same manner that the stock in the several banks in this State which are chartered under the authority of this State, are liable to be taxed by the existing laws thereof."

By the existing laws of Vermont at that time, (*Gen. Stat. of Vermont, chap.* 83), all personal estate (which is expressly declared to include "all

public stocks or securities in moneyed or other corporations"), is taxable in the town where the owner resides, if a resident of the state, and nowhere else.

Under the statute in question, therefore, shares in the national banks, which the Act of Congress provides shall be taxed at the place where the bank is located, and not elsewhere, are made taxable in the respective towns where the owners may reside, and not elsewhere.

It is for the purpose of this method of taxation that the statute requires the cashiers to transmit to the town clerks of all towns where any stockholders may reside, lists of such stockholders, and of the number of their shares. And for a neglect or refusal so to do, prescribes the penalty which this suit was brought to recover.

The statute of Vermont is, therefore, in direct and palpable conflict with the provisions of the Act of Congress in respect to the place where the shares shall be taxed. Both cannot stand. One or the other must give way.

The Act of Congress of 1868, authorizing the taxation of the shares in the town where the owner lives, was not then in force.

The validity of a State law providing for such a mode of taxation prior to the Act of 1868, has been twice before the Court, in the cases of *Austin* v. *The Alderman*, 7 *Wallace*, 694; and *Tappan* v. *Merchants' Nationat Bank*, 19 *Wallace*, 490. In both instances it was left undecided, the decision becoming unnecessary. But the language of the Court in the latter case indicates their opinion that the state law could not be supported. And the plain and explicit terms of the Act of Congress, leave no room for a discussion of the question.

In the *City of Utica* v. *Churchill*, 33 *N. Y. Rep.*, 161, the Court of Appeals held, that the assess-

ment of a shareholder in a national bank out of the ward in the city of Albany where the bank was located, and in accordance with the existing laws of New York on the subject, was void, because it conflicted with the 41st section of the Act of Congress.

The validity of the Vermont statute in this particular, directly affects the plaintiff in error. It is for a refusal to aid in carrying out the mode of taxation, thus expressly prohibited by the Act of Congress, that the penalty has been enforced against him by the rendition of the judgment of which he complains. He is, therefore, entitled to insist upon the invalidity of the statute in respect of the mode of taxation it provides, as well as in respect of the personal duty and penalty it imposes upon him.

IV.—It may, perhaps, be claimed, on the part of the defendant in error, that the decision of the Supreme Court of Vermont did not involve the question of the constitutionality of the Vermont statute, on all the grounds now made, and is, therefore, only partially revisable here.

In a report of the case, published in the 46th of Vermont Reports, p. 689, will be found an opinion, purporting to be that of the Supreme Court, in which the affirmance of the judgment rendered against the plaintiff in error in the County Court is placed *in part* on the ground that the defense of the unconstitutionality of the statute on which the action was brought, should have been made by demurrer, and not under the general issue.

1. It is to be observed of this opinion, that it only attempts to apply the objection of the form of

pleading to one point in which the statute in question was claimed to be invalid. Its general constitutionality, as not being in conflict with the Act of Congress, is considered and affirmed.

According to this opinion it was decided by the court, that the statute was not repugnant to the Act of Congress in its provisions relative to the taxation of stockholders in Vermont. And that a compliance by the plaintiff in error with the requirements of the Act of Congress in respect to the information to be furnished to the assessors, did not exempt him from liability to the penalties given by the Vermont statute for failure to comply with its further provisions on that subject. And the report shows, that no other question was presented by the exceptions, or argued on either side, except that of the constitutionality of the statute.

From the opinion itself, it appears therefore, that the federal question was so far considered and decided, as to make the case clearly reviewable in this court.

2. But if there can be any doubt upon this point, it is further to be remarked, that the opinion forms no part of the record now before the Court. It is not only not contained in the record, but was never filed, nor by either the law or the practice in Vermont was it required to be filed in the cause. It was furnished to the reporter by the judge who prepared it, long after the decision, and long after the present writ of error was entered and pending in this Court. Such is the custom in regard to these opinions in Vermont. A judge who writes an opinion, furnishes it to the reporter, if he pleases, and when he pleases. When furnished, the case is reported. If not furnished it is not reported.

Parmenter v. *Kingsley*, 45*th Ver. Rep., p.* 362,

and *Shackelt* v. *Hammond*, 46*th Ver. Rep., p.* 466, are instances, among many that could be cited, where it appears that the opinions were not furnished the reporter till some years after the decisions were made, and in the former case, not till some years after the judge who wrote it had left the bench.

The opinion in question, therefore, will, under no circumstances, be resorted to or considered, in ascertaining what question the record discloses. It is upon the record, and the record alone, that the case must here be determined.

Upon this point the decisions of the Court have been numerous and unvarying. Not only will they decline to regard a written or reported opinion, in aid or explanation of the record, even though filed in the cause, but a subsequent alteration of the record itself, by the court that made it, will not be received for that purpose.

"The opinion of the court, or the reasons given for its judgment, (unless in the case of instructions to the jury spread upon the record by a bill of exceptions), form no part of the record within the meaning of the 25th section. Nor are they made a part of the record in Tennessee by the local law of that State, requiring the judges to file their opinions in writing among the papers in the case."

"No orders in the state court after the removal of the record into this Court, (not made by way of amendment, but introducing new matter), can be brought into the record here. The cause must be heard and determined upon the record as it stood when removed."

Williams v. *Norris*, 12 *Wheat*, 117.

In the opinion in this case, Ch. Jus. MARSHALL says :

"Can the opinion of the judge introduce any fact into the cause? Whenever a judgment is rendered, on a special verdict, for example, can he, by an opinion filed ten days afterwards, control the facts found in that verdict? Or can he, by anything inserted in his opinion, warrant any legal inferences that the verdict itself would not justify, or in any manner change the legal effect of the findings?" * * * *

"We cannot, therefore, imply from the loose expression which has been cited," (Statute of Tennessee), "so extraordinary a result, as that the opinion of the court, filed after judgment as an argument, should be considered a part of what is technically denominated the record, or should be a supplement to the verdict."

"In the present case the opinion which has been filed has been inspected, and seems to have been founded on a construction of the laws of the state, without calling into question the constitution of the United States or any act of Congress. This, however, is not relied on, *because, as has been stated, the opinion has no other influence on the cause than it would have had if published in a book of reports*," (*p.* 464.)

In the case of *Ocean Ins. Co.* v. *Pollys*, 13 *Peters*, 157, Judge STORY says :

"We have been furnished with a copy of the opinion of the learned judges in the state court in this very case, and we are gratified in finding that it abundantly confirms the deduction which we have made from the record. But it is proper to add, that that opinion, if it had been otherwise, could not have had any influence upon our present opinion, since it constitutes no part of the record, and it is to the record and the record only that we can resort to ascer-

tain our appellate jurisdiction in cases of this sort."

In *Medberry* v. *Ohio*, 24 *Howard*, 413, it is held—

"Whether this Court has or has not jurisdiction under the twenty-fifth section of the Judiciary Act, may be ascertained either from the pleadings or by bill of exceptions, or by a certificate of the court.

But the assignment of errors or the published opinion of the court cannot be received for that purpose. They make no part of the record proper, to which alone this Court can resort to ascertain the subject matter of the litigation."

In *Edwards* v. *Elliott*, 21 *Wall.*, 532, it is held that the Court will not resort to printed reports in aid of the record.

And where, after a writ of error brought to the Supreme Court of the United States, the state court had ordered the judgment appealed from to be expunged, and a new and materially different judgment rendered, it was decided that the first judgment was the one before the Court, and upon which the case must be determined.

See also to the same effect

Reed v. *Marsh*, 13 *Pet.*, 153.
City of Mobile v. *Eslava*, *ib.* 234.
Railroad Co. v. *Rock*, 4 *Wall.*, 177.

In the first of these cases it was held that a motion for a new trial, and the grounds on which it was urged, would not be considered by the Court in connection with the record, to show what questions were decided on the trial.

In all of them, the published opinion of the state court, and in the last named the certificate also of the judges as to the points actually decided, were refused to be considered by this Court, in determining their appellate jurisdiction.

3. Examining this case upon its record, and applying to it the rules of construction established by the Court, it plainly appears that the question of the constitutionality of the Vermont statute was not only necessarily involved in the decision rendered by the Supreme Court of Vermont, but was actually decided by that court in favor of the validity of the statute.

It is shown by the record that the action against the plaintiff in error was founded upon the statute in question, which is set forth in the declaration; and was brought to recover certain penalties given by that statute for a failure to comply with its requirements. That on the trial in the County Court all the facts necessary to support the action were conceded. That the sole defence set up, was the invalidity of the statute in question, on the ground of its repugnancy to the Act of Congress. That so far from objection being taken to the interposition of that defence under the pleadings, any such objection was expressly waived. That the court, thereupon, for the purpose of submitting the question of the validity of the statute to the Supreme Court, ruled *pro forma* in favor of the plaintiff in the action, and directed a verdict in his favor for two penalties, with leave to the defendant to except. That an exception to this decision was duly taken and allowed, and the cause passed to the Supreme Court. That in that court "*said exceptions were read*, and the arguments of counsel," &c., heard. * * * "And the court here *having heard the said exceptions and arguments aforesaid, and being fully advised relative thereto, doth consider that the defendant take nothing by his exceptions, and that the said judgment of said County Court be, and the same is, in all things affirmed*, and that the plaintiff recover of the defendant the damages

assessed and found by the jury aforesaid, with interest, * * and costs in the County Court, together with his costs in this court," &c. (*Record, fol.* 28).

That a petition for a writ of error was then immediately addressed to the Supreme Court of Vermont, by the defendants in the action, setting forth in detail that the validity of the statute referred to had been drawn in question, and passed upon by that court, and that the decision had been in favor of the validity of the statute, and the writ of error thus prayed for was allowed by the chief justice. (*Record, fol.* 30).

Upon these statements in the record, it will be taken that the affirmance by the Supreme Court of the judgment of the County Court was an affirmance of the correctness of the decision excepted to. And it will not be assumed that it may have been based on some other ground, now suggested, in the absence of anything in the record to show it.

This was expressly held in the case of *Neilson* vs. *Lagow*, 12 *How.*, 110. In that case, as in this, it was contended that the Supreme Court of the state, in affirming a judgment of a lower court, might have proceeded upon other grounds than the decision of the Federal question involved.

The court, by Mr. Justice CURTIS, say :

"The bill of exceptions, taken in this case, in the Circuit Court, shows that the construction of the acts of Congress was in question in that court, was misconstrued there, and a deed, under which the plaintiffs in error deduced title, was decided to be void, by reason of such misconstruction. This decision being excepted to, was by the appeal brought before the Supreme Court ; and when that court determined that the judgment of the Circuit Court be in all things

affirmed, it must be taken that the Supreme Court affirmed the correctness of the decision thus excepted to, unless it appears by the record that they proceeded on some other ground."

4. But assuming. for the sake of the argument, that the record, in this case, does not affirmatively show upon what ground the affirmance of the judgment by the Supreme Court of Vermont was founded, the only allowable inference is, that it was upon the ground of the validity of the statute in question.

It has been many times held, that it need not appear, in terms upon the record, that a federal question was decided, in order to give this Court jurisdiction under the twenty-fifth section of the Judiciary Act.

"If the repugnancy of a statute of a state to the Constitution of the United States was drawn into question, or if that question was applicable to the case, this court has jurisdiction of the cause."

Satterlee v. *Mathewson*, 2 *Peters*, 409.

"It is sufficient to bring the case within the provisions of the twenty-fifth section, if the record shows that the Constitution or laws of the United States must have been misconstrued, or the decision could not have been made; or that the constitutionality of a state law was questioned, and the decision was in favor of the party claiming under such law."

Wilson v. *Black Bird Creek Marsh. Co.*, 2 *Pet.*, 250.

"It is sufficient, if, from the facts stated, such a question must have arisen, and that the judg-

ment of the state court would not have been what it is, if there had not been a misconstruction of some Act of Congress," &c.; "or a decision against the validity of the right, title, privilege, or exemption set up under it."

Harris v. *Dennie*, 3 *Pet.*, 292.

"It is sufficient, if it appears from the record that an Act of Congress was applicable to the case, and was misconstrued; or the decision of the state court was against the privilege or exemption specially set up, under such statute."

Davies v. *Packard*, 6 *Pet.*, 41.

To the same effect are—

Miller v. *Nichols*, 4 *Wheat.*, 44.
Crowell v. *Randall*, 10 *Pet.*, 368.
Mills v. *Brown*, 16 *Pet.*, 525.
Neilson v. *Lagow*, 12 *How.*, 110.
Maguire v. *Tyler*, 8 *Wall.*, 651.
Ins. Co. v. *Treasurer*, 11 *Wall.*, 204.
Edwards v. *Elliott*, 21 *Wall.*, 532,

And various other cases.

It is idle to claim, upon the facts disclosed by this record, that the question of the validity of that statute was not applicable to the case, and necessarily involved; that the judgment of the state court could have been reached without maintaining such validity; or would have been what it is, unless the Act of Congress had been misconstrued.

The defendant in error, on the other hand, asks the Court to infer that the judgment was arrived at, not upon a determination of the only question presented by the exceptions, but upon an erroneous decision by the appellate court on a technical point of pleading, foreign to the

merits, never raised in the case at all, not presented to them for revision, and on which the party affected had not been heard.

In other words, that final judgment against the defendant for these heavy penalties, given by an unconstitutional statute, was rendered upon the ground that the plaintiff's declaration disclosed no ground of action at all.

This construction of the record requires the presumption that the Supreme Court of Vermont committed grave and palpable errors.

(*a.*) In determining the case upon a question in no way contained in the record before them.

Upon obvious principles and universal practice an appellate court is confined to questions presented by the record. Especially in respect to purely technical points, which if made below could, if well founded, have been obviated. Starting this point for the first time in the final and silent decision of the case in the Supreme Court, would not only have deprived the plaintiff in error of the opportunity of being heard in regard to it, but also of the common right either of amending his pleadings, or moving in arrest of judgment; and would result in making him finally liable for heavy penalties, under a statute the constitutionality of which he denies, and the court rendering the judgment does not venture to affirm.

(*b.*) In deciding the question itself erroneously, not only under the general rules of law applicable to the subject, but especially under the previous reported decisions of the Supreme Court of Vermont.

It may be confidently asserted that no case can be found where it was ever before claimed, much less decided, that under the plea of the general issue to a declaration which sets forth a statute, and goes for a penalty given by the

statute for a violation of its provisions, the unconstitutionality of such statute can not be insisted on as a defense; or in which judgment was ever before rendered against a defendant, when it was conceded that the declaration upon its merits set forth no cause of action.

And in the case of *Baxter* vs. *Winooski Turnpike Co.*, 22 *Ver. Rep.*, *p.* 125, will be found an elaborate discussion and review of the authorities, especially the Vermont cases, on the question whether a defendant who pleads the general issue to a declaration and puts the plaintiff to the proof of it before a jury, can at the conclusion of the evidence, insist that the facts stated in the declaration are not, though proved, sufficient to entitle the plaintiff to recover. And it was decided by the court, that it is the correct and usual practice to allow this to be done, and a judgment so rendered was affirmed.

The deductions from the record thus seem to be necessary to support the construction of it contended for by the defendants in error, are such as the Court will in no case make. It will never be presumed, either that the court below turned the case upon a question not before them, or that they rendered an erroneous decision. Much less that they did both. The presumption is the other way.

On this point, the case of *Neilson* v. *Lagow*, 12 *How.*, already cited, is directly apposite. The Court there say, in continuation of the language before quoted:

"And so the enquiry still remains, whether the Supreme Court did not affirm the judgment of the Circuit Court, upon the ground suggested in argument by counsel for the defendant in error, that the deed in question conveyed only a life estate, which had terminated before

action was brought. We cannot make that deduction from this record. It does not appear that the question what that deed conveyed, if valid, was in any manner raised in the Circuit or Supreme Courts; and assuming that the Supreme Court were not confined on the appeal to points raised in the court below, but might have decided upon any ground shown by the record before them to be tenable, we cannot infer that the decision rested on this ground, because we are of opinion it is not tenable. If it had appeared affirmatively on the record that the Supreme Court did decide that the deed conveyed only a life estate, this Court would not enquire into the correctness of that decision; but when put to infer what points may have been raised, and what that court did decide, we cannot infer that they decided wrong. Otherwise nothing would be necessary in any case to prevent this Court from reversing an erroneous judgment, under the twenty-fifth section of the Judiciary Act, but that counsel should raise on the record some point of local law, however erroneous, and suggest that the court below may have rested its judgment thereon."

Even had the record in the case distinctly shown that this question on the pleadings had been actually raised, so that the judgment of the state court might, perhaps, have proceeded on that ground, this Court would not presume that the judgment did so proceed, if such a decision would have been erroneous.

In *Maguire* v. *Tyler*, 8 *Wall.*, 651, it was held that " when the decree of a state court sought to be reversed is silent as to the ground upon which it was rendered, jurisdiction under the 25th section of the Judiciary Act is maintainable, if the case shows that federal questions were involved, though it also appeared

that there were other defences not re-examinable in this Court, if these defences offered no legal answer to the suit. This Court will not presume that the court below decided these questions erroneously, in order to defeat their own jurisdiction."

And the same point was decided in *Klinger* v. *State of Missouri*, 13 *Wall.*, 357.

In determining what the record really discloses, it will receive that just, fair, and reasonable construction, accorded to all other written instruments.

As remarked by the court in the case of *Ocean Ins. Co.* v. *Pollys*, before cited—

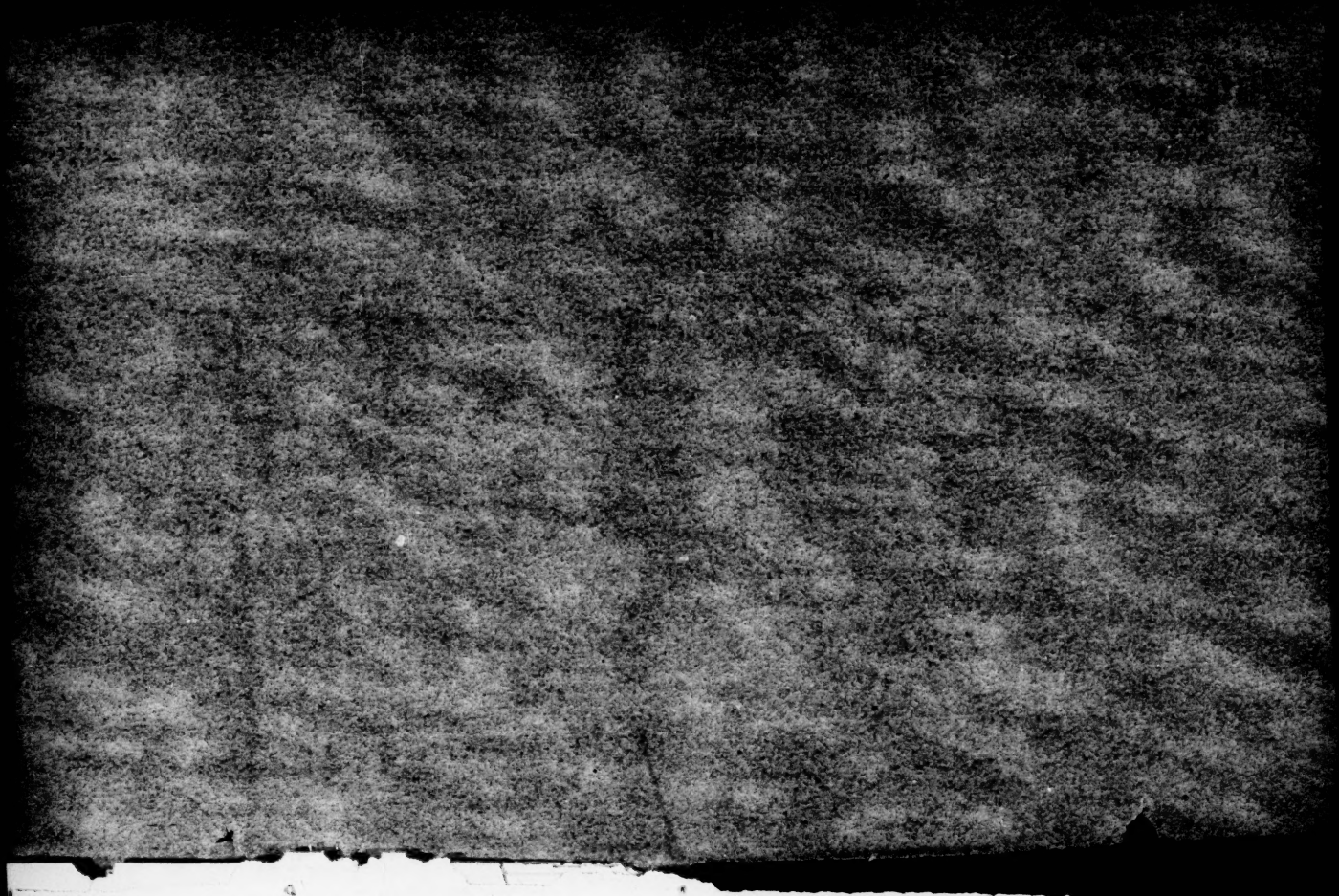
"In the exercise of the appellate jurisdiction of this Court over the decisions of state courts, we are not at liberty to resort to forced inferences and conjectural reasonings, or possible or even probable suppositions of the points raised and actually decided by these courts."

It may with propriety be remarked upon this record, that the construction of it now claimed, would hardly have occurred to the most fertile ingenuity, unaided by the suggestions of the published opinion. In the absence of that opinion, it would have been regarded as an unjustifiable aspersion upon the Supreme Court of Vermont to attribute to them a conclusion so preposterous in its law, and so monstrous in its injustice; a conclusion which the opinion itself, if resorted to, by no means warrants.

Had this cause been heard during the first term in which it was pending in this court, and before the publication of this subsequent opinion, there can be no doubt at all as to the construction it would have received. A different conclusion now from that which would have been reached then, can only be arrived at by allowing the opinion to contra-

dict the averments, and change the just and legitimate legal inferences of the record. And thus to give it an effect which, as has been seen, this Court has refused to give, either to a judicial alteration and amendment of the record itself, by the court from which it came, or to the certificate of the judges as to the grounds of their decision. In other words, by resorting to parol evidence, in contradiction and enlargement of the record.

E. J. PHELPS,
Counsel for Plaintiff in error.



No. 191.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1876.

SILAS M. WAITE,

PLAINTIFF IN ERROR,

vs.

GEORGE S. DOWLEY,

Treasurer of the Town of Brattleboro,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

BRIEF AND POINTS FOR DEFENDANT IN ERROR.

—BY—

CHAS. N. DAVENPORT, ATTORNEY AND COUNSEL.

BRATTLEBORO, VT.:
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1876.

SUPREME COURT OF THE UNITED STATES.

SILAS M. WAITE, Pl'ff in Error, *vs.* GEO. S. DOWLEY, Treasurer of the Town of Brattleboro, Deft. in Error.	OCTOBER TERM. 1876. No. 191.

BRIEF AND POINTS FOR DEFENDANT IN ERROR.

BY CHAS. N. DAVENPORT, COUNSEL.

I. It appears by the record that the Treasurer of the Town of Brattleboro, in the County of Windham and State of Vermont, brought an action at law, founded upon the provisions of a statute relative to the duties of bank cashiers, against Silas M. Waite, the plaintiff in error, which was entered in the Windham County Court at its April term, 1870, tried by jury upon the general issue of "not guilty," at the September term, 1872. A verdict returned for plaintiff below, to the effect that the "Defendant is guilty in manner and form, etc., and finding for the plaintiff to recover eleven hundred and fifty dollars damages." The County Court rendered judgment according to the verdict, and, on motion of the defendant, the presiding judge allowed him a bill of exceptions, upon which the cause passed to the Supreme Court of the State of Vermont for revision.

Record, Pages 1, 6, 7.

The cause was entered in said Supreme Court at its February term, 1873, and the exceptions argued by counsel, and held by the court for advisement until the February term, 1874, when the exceptions were overruled, the judgment of the County Court in all things affirmed, and the final judgment of the highest court in the

State rendered for the plaintiff below to recover, for the use and benefit of the town of Brattleboro, the sum of $1,247.75 damages, and $108.47 costs of suit. It is this judgment which is sought to be revised upon the pending writ of error.

Record, Pages 7, 8.

The opinion of the Supreme Court of Vermont is for some reason omitted from the record. It will be found in an appendix to this brief.

II. The cause of action in favor of the plaintiff below is created by a statute law of the State of Vermont, entitled "An act providing for taxing bank stock in the several banking associations of this State formed under the act of Congress approved June 3d, 1864, entitled 'An act to provide a national currency.'" This act was approved by the Governor of Vermont, Nov. 9th, 1865. So much of the act as creates and gives a right of action is contained in the first, third and fifth sections, which are recited in the plaintiff's declaration, and are in the following words:—

"SEC. 1. It shall be the duty of the cashiers of the several banking associations in this State formed under the act of Congress approved June 3d, 1864, entitled 'An act to provide a national currency,' and the cashiers of all other banks in this State, to transmit to the clerks of the several towns in this State in which any stock or shareholder of such banking association shall reside, a true list of the names of such stock or shareholders, with the number of shares standing against the name of each of such stock or shareholders, on the books of such banking association, together with the amount of money actually paid in on each share, on the first day of April in each year hereafter, on or before the 15th day of April in each year."

"SEC. 3. If any of the stock of such banking association is owned by, or stands in the name of, any person residing out of the State, it shall be the duty of the cashiers of such banking associations to transmit to the clerk of the town in which such banking association is situated the names of all such non-resident stock or shareholders, with the number of shares standing against the name of each of such stock or shareholders on the books of such banking association, together with the amount of money actually paid in on each share, on or before the 15th day of April in each year."

"SEC. 5. If any cashier shall neglect or refuse to make returns to any town in this State, as provided in this act, he shall forfeit and pay to the treasurer of such town, for the benefit of such town, the sum of five hundred dollars, to be recovered by an action on the case, in the name of such treasurer, founded on this statute."

Record, Page 2.

The declaration further sets forth a state of facts which created a duty upon defendant below, during the years 1866 and 1867, to transmit to the clerk of the town of Brattleboro, for those years, the lists of stock or shareholders in the First National Bank of Brattleboro mentioned in the first and third sections above recited, and alleges that he wholly neglected and refused to discharge that duty, "whereby, and by force of said statute, an action hath accrued in favor of the plaintiff, treasurer," etc.

Record, Pages 3, 4, 5.

To this declaration the general issue of not guilty was pleaded. The record shows no demurrer, or motion in arrest of judgment. Issue was joined upon the plea of not guilty, and the cause tried by jury. "The defendant conceded that, in the years 1866 and 1867, he made no returns to the clerk of said town of Brattleboro, as required by said act of 1865."

Record, Page 6.

"Defendant's counsel claimed in defence that, as said bank was organized under said law of Congress referred to in the plaintiff's declaration, the defendant, as such cashier, was amenable to no law but said law of Congress, and that the State legislature had no power to prescribe or define his duties as such cashier."

Record, Page 6.

The County Court declined to hold as requested, and directed a verdict to be taken for plaintiff, with leave to the defendant to except. Exceptions were taken, and, upon hearing, overruled by the Supreme Court, and final judgment rendered for the plaintiff below.

III. We respectfully but confidently submit that this court has no jurisdiction of the pending cause. The petition for the writ of error asserts, "That, on the trial of said cause, there was drawn in question the validity of said first and fifth sections of said act, as being in conflict with the constitution of the United States, and repugnant to the laws of Congress relating to banking passed June 3d, 1864. That it was claimed on trial that said act of the Vermont legislature was null and void, and that no law or power existed authorizing the State authorities to assess for taxation the shares in national banks. That such proceedings were had in the County Court that said claim and defence were overruled, and it was then and there decided by said court that said act was valid, and not repugnant to the constitution or laws of the United States, and that the plaintiff in said suit was entitled to recover. And that, upon due exception to said ruling and decision, the cause was carried to the Supreme Court, whose decision "was adverse to the said defence set up by your petitioner, and in favor of the validity of said State law, and deciding that it was not in violation of the constitution of the United States, or repugnant to the law of Congress, and that the State authorities were authorized to assess the shares in national banks."

Record, Pages 9, 10.

It is probable that the petition sets forth a state of facts that would give this court jurisdiction. A reference to the record makes it apparent that the validity of a statute of the United States was not necessarily involved in the decision of the State court; and when the opinion of the court is looked into, it affirmatively appears that the decision was made upon other grounds, and the validity of the federal statutes relative to the taxation of stock or shares in national banks in no way brought in controversy or involved in the decision.

In the opinion of the court, [46 Vt., 689] Judge Peck says: "This court, in hearing cases on exceptions, sits as a court of error to revise such questions only as were properly presented and involved in the decision of the County Court,—not such questions as might have been presented by different pleadings. The declaration having alleged that the defendant was cashier of a national bank organized and doing business under the laws of Congress, and having recited the statute of this State prescribing his duty and imposing

the penalty for its breach, and the defendant having gone to trial upon the general issue, and not having moved in arrest of judgment in the County Court, the question of the sufficiency of the declaration, and consequently the question of the validity of the statute of the State, as against the defendant, is not in issue."

This court has only such jurisdiction to revise the decisions of the State courts as Congress has conferred upon it. The act of February 5, 1867, limits and defines the jurisdiction in this class of cases. It authorizes a writ of error to revise the decisions of the State courts only in cases of—

a. "A final judgment or decree in any suit, in the highest court of a State in which a decision in the suit could be had, where is drawn in question *the validity of* a treaty or *statute of*, or an authority exercised under, *the United States*, and the decision is against their validity; or where is drawn in question *the validity of a statute of*, or an authority exercised under any State, on the ground of their being repugnant to the *constitution*, treaties *or laws of the United States*, and the decision is in favor of their validity, * * * may be re-examined, and reversed or affirmed, in the Supreme Court upon a writ of error."

U. S. Statutes, §709, p. 132.

The statute of February 5, 1867, above recited, is, so far as relates to the questions involved in the case at bar, identical in language and construction with the 25th section of the Judiciary Act of 1789. The decisions of this court under the old statute are, therefore, in point, and authoritative.

b. There has been an entire uniformity of decision upon the question of the jurisdiction of this court on writ of error from the State courts. The rules controlling the question are well stated in Armstrong *et al. v.* the Treasurer of Athens Co., [16 Peters, 285] where Mr. Justice Catron says, that, in order to confer jurisdiction under the 25th section of the act of 1789, "it must appear on the record itself to be one of the cases enumerated in that section, and nothing out of the record certified to this court can be taken into consideration. This must be shown

1. Either by express averment or by necessary intendment in the pleadings in the case; or

2d. By the direction given by the court and stated in the exception; or

3d. It must be entered on the record of the proceedings of the Appellate Court in cases where the record shows that such a point may have arisen and been decided—that it was, in fact, raised and decided; and this entry must appear to have been made by order of court, and certified by the clerk as a part of the record in the State court; or

4th. It must appear from the record that the question was necessarily involved in the decision, and that the State court could not have given the judgment they passed without deciding it."

Without citing the many cases where this doctrine has been held and recognized, it is sufficient to say that the latest utterances of this court are in exact accord with the case in the 16th of Peters.

McManus *v.* O'Sullivan, I Otto, 578.
Bolling *v.* Lersver, Ibid., 594.

In the case last cited, Chief Justice Waite says: "We cannot re-examine the judgment or decree of a State court simply because a Federal question was presented to that court for determination. To give us jurisdiction, it must appear that such a question was in fact decided, or that its decision was necessarily involved in the judgment or decree as rendered."

It is obvious that the record is entirely devoid of the needed elements to confer jurisdiction. The pleadings only relate to a statute law of Vermont. The court which tried the cause by jury gave no directions in regard to any statute of the United States. They simply told the jury that upon the whole case, as made up by the parties, the plaintiff below was entitled to recover. It was to this direction only that exception was taken, and the only one passed upon by the Supreme Court of Vermont. There is no certificate of the presiding judge, or the clerk of the State court, that any question of the validity of a United States statute was raised or decided, or in any way involved in this case. [See upon the point that the jurisdiction must appear upon the record.]

Fisher *v.* Cockerill, 5 Peters, 248.
Crowell *v.* Randell, 10 Peters, 368.
Reed, Lessee, *v.* Marsh, 13 Peters, 153.

All the cases upon this subject, up to 1836, are collated and reviewed by Mr. Justice Story in Crowell *v.* Randell, above cited.

IV. The right of the States to tax the shares or stock of national banks is conferred by the act of 1864. The proviso to the 41st section declares "That nothing in this act shall be construed to prevent all the shares in any of said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by, or under, State authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such State. Provided, further, that the tax so imposed, under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located."

13 Stat. at Large, 102.

a. In order to facilitate taxation and promote the convenience of the assessors under State authority, the 40th section of the act of 1864 makes it the duty of the president and cashier to keep a correct list of all the shareholders, with their residences and the number of shares held by each, which shall be subject to the inspection of "the officers authorized to assess taxes under State authority, during business hours," etc.

13 Stat. at Large, 102.

b. With the same purpose in view, as well as to remove doubts which had arisen as to the construction of the act of 1864, Congress, by act approved February 10, 1868, enacted: "That the words 'place where the bank is located, and not elsewhere," in Sec. 41 of the 'Act to provide a national currency,' approved June 3d, 1864, shall be construed to mean 'the State within which the bank is located." And the legislature of each State may determine and direct the *manner and place* of taxing all the shares of national banks located within said State, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and provided always that the shares of any national bank owned

by non-residents of any State *shall be taxed in the city or town where said bank is located, and not elsewhere.*"

15 Stats. at Large, 34.

c. The entire harmony of the legislation of Vermont with that of Congress, upon the subject of the taxation of the stock of national banks, will appear by reference to the sections of the act of the legislature recited in the declaration [Record, p. 2], and the second section of the same act (omitted because it had nothing to do with creating the duty of cashiers or imposing the penalty). It is as follows:

"SEC. 2. The stock and shares of all such banking associations shall be set in the list and taxed in the same manner that the stock in the several banks in this State, which are chartered under the authority of this State, are liable to be taxed by the existing laws thereof."

d. It seems to us that every conceivable objection to the legislation of Vermont, relative to the taxation of the stock or shares of national banks, has been answered and disposed of by the act of Congress of February 10, 1868, and the decisions of this court in analogous cases. In the case of Tappan, Collector, *v.* Merchants National Bank, 19 Wallace, 490, it is held—

1. That shares of stock in the national banks are personal property, and, though they are a species of personal property which, in one sense, is intangible and incorporeal, the law which created them could separate them from the person of their owner for the purpose of taxation, and give them a *situs* of their own.

2. That the 41st section of the National Banking Act, in effect, did this.

3. That the provisions of the National Banking Act, relative to taxation, became a law of the property, and every State within which a national bank was organized and located acquired jurisdiction, for the purposes of taxation, of all the shareholders of the bank, both resident and non-resident, and of all its shares, and power to legislate accordingly.

e. "Since the decision of the case of Van Allen *v.* The Assessors," says Mr. Justice Davis, "it is no longer an open question in this court that the shareholders in a national bank are subject to

State taxation, although the entire capital of the bank be invested in the bonds of the United States."

Lionberger *v.* Rouse, 9 Wallace, 468.
Van Allen *v.* Assessors, 3 Ibid., 573.
People *v.* Commissioners, 4 Ibid., 244.
Bradley *v.* The People, 4 Ibid., 459.
Bank *v.* Commonwealth, 9 Wallace, 353.

V. The following propositions are clearly settled and established by repeated decisions of this court:

1. That the shareholders or stockholders of national banks, whether resident or non-resident, may be taxed in the State where the bank is located, by the State authorities, on *stock* or *shares* so held by them, without regard to whether the *capital* of the bank is, or is not, invested in United States securities.

2. The only restrictions upon the power of State taxation, under the act of 1864, are those designed to prevent unjust discrimination against these institutions, which are: First, that they shall not be assessed at a greater rate than other moneyed capital in the hands of individual citizens of the State; and, second, that the tax imposed by any State shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of that State.

3. Subject to these restrictions only, the power of the States over the stock or shares of national banks for the purposes of taxation, and the right to adopt such means and methods as will render the assessment and collection of the taxes feasible, is co-extensive with their powers over other species of property.

4. The stock or shares in national banks are under the dominion of the States. The State is bound to afford protection to that, in common with other property. If Congress had not conferred, in express terms, the right of taxation, such right would arise from the duty of protection. It is, or should be, a fundamental principle that all property which the State protects should bear its just share of the expense of that protection.

5. National banks and their officers are amenable to State laws. Says Mr. Justice Miller, in Bank *v.* Commonwealth, 9 Wallace, 362: "They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of

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the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when a State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."

6. The fact that a national bank is one of the fiscal agents of the federal government does not withdraw it from the power of State legislation, or exempt its shares or stock from taxation. The well-settled doctrine of this court, since the decision of McCullock *v.* Maryland, is, in the language of Mr. Justice Miller: "That the agencies of the federal government are only exempted from State legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government."

Bank *v.* Commonwealth, 9 Wall., 362.

VI. We have considered this case so far upon the supposition that the right of the State of Vermont and its municipalities to tax the stock or shares of national banks, and the validity of her statutes enacted for that purpose, were questions presented upon the record. We have shown, we think, that the stock of the First National Bank of Brattleboro, of which the plaintiff in error is cashier, was, by the laws of Vermont and of the United States, subject to taxation, and that the legislation of Vermont, upon the subject, is in harmony with the acts of Congress to provide a national currency, and the decisions of this court; so that, if the validity of a tax assessed by the authorities of Brattleboro was a point in issue upon this record, we should be entitled to an affirmance of the judgment of the Supreme Court of Vermont.

a. No such question is presented upon the record. The only federal question raised is the claim in the court below, that, because Waite was the cashier of a national bank, he was "amenable to no law but said law of Congress, and that the State legislature had no power to prescribe or define his duties as cashier." And this, we confidently submit, was the only federal question that the Vermont courts were asked to, or in fact did, consider.

b. Waite was a citizen of the State of Vermont. The bank of which he was cashier was located within the jurisdiction of that

State. The stock and shares of the bank were under the protection of the laws of that State. Congress had in express terms conferred upon Vermont, in common with other States, the right to impose the same rate of taxation upon such shares as upon other like property. To make effectual this right, to promote uniformity and equality in the taxation of this species of property, to make the assessment and collection of these taxes convenient and feasible, its legislature has made it the duty of all cashiers to transmit to the clerks of the several towns true lists of the shares or stock in their respective banks belonging to any citizen of such town, and, to the clerk of the town in which the bank is located, a true list of the shares belonging to persons residing out of the State.

c. Whenever a State has the right to tax any species of property, that right carries with it the power to use such means and methods, by legislation, operative upon its own citizens, within its own jurisdiction, as will make the assessment and collection of such taxes convenient and feasible, and in the matter of regulating internal taxation the State legislature is supreme. These powers are incident to the sovereignty of the State, and their existence self-evident.

d. A requirement by a State legislature that the cashier of a bank within its limits shall make the returns to the town clerks provided for in the act in controversy, is a reasonable exercise of the power of a State; but, whether reasonable or not, is purely a question for the legislature. This court has no jurisdiction of the question.

e. The assumption that the cashier of a national bank is "amenable to no law," human or divine, but "said law of Congress," is too absurd for serious consideration. Congress has never attempted to interfere with the means and methods which the several States have adopted in the assessment and collection of taxes upon the stock of national banks; and this court has shown its inclination to uphold all State legislation to promote the taxation of this species of property which did not unjustly discriminate against it. See—

Bank *v.* Commonwealth, 9 Wall., 353.
Lionberger *v.* Rouse, Ibid., 468.
Tappan *v.* Merchants Bank, 19 Wall., 490.

VII. This cause has twice been before the Supreme Court of Vermont. At the first trial it was said by Judge Wheeler, who gave the opinion of the court: "This act was passed to make the stock of national banks in this State taxable, and to make the taxation of it feasible." And again: "Upon the facts of this case as they stand admitted upon the pleadings, defendant owed to the town of Brattleboro the duty of transmitting to the clerk of that town a list of some stockholders of the bank of which he was cashier, whose stock that town had the right to tax in the years 1866 and 1867, and he did not perform that duty in either of those years. When he thus omitted to do the duty he owed, he committed a wrong to the town." This well states the obligation created by the act of 1865, and the duty of the defendant to obey it. When defendant thus omitted his duty, he became subject to the forfeitures prescribed for his neglect.

Treasurer of Brattleboro *v.* Waite, 43 Vt., 587.
Ibid. *v.* Ibid., 46 Vt., 689.

We have deemed it important that this court should be in possession of the opinion of the court below. That opinion was—by accident, probably—omitted by plaintiff in error in making up the record. We have supplied the omission.

CHAS. N. DAVENPORT, Counsel.

APPENDIX.

SUPREME COURT, STATE OF VERMONT.

WINDHAM COUNTY, FEBRUARY TERM, 1874.

TREASURER OF BRATTLEBORO *v.* SILAS M. WAITE.

Copy of Opinion of Court, as Reported in 46 *Vt.*, 689.

The opinion of the court was delivered by Peck, J. It appears that on the trial before the jury, under the general issue not guilty, the defendant objected that he, being cashier of a national bank, was not amenable to the statute law of the State creating the duty and imposing the penalty in question. To determine whether the county court erred in law in not recognizing this as a defence, it is proper in the first place to see whether the question of the validity of the statute, as against the defendant, was involved in the issue then on trial. This depends on the state of the pleadings. The declaration, which is referred to, among other things sets forth that the defendant, at the time in question, was cashier of the First National Bank of Brattleboro, organized under the act of Congress, etc., located and doing business at Brattleboro. It also alleges the passing of the act of Nov. 9, 1865, by the legislature of Vermont, and recites the sections of the statute creating the duty, the breach of which is complained of, upon all cashiers of national banks and cashiers of all other banks in this State, and imposing a forfeiture of five hundred dollars to the town in reference to which any such cashier shall neglect or refuse to perform that duty. The plea is, *not guilty*. The issue was as to the truth of the declaration, not as to its sufficiency in law. If the plaintiff proved the declaration, he was entitled to a verdict in the absence of proof of facts on the part of the defendant to obviate it. The statute being recited in the declaration, and the defendant being alleged to be a cashier of a national bank, the validity of the statute was not put in issue by the plea. If the defendant wished to raise the question as to the

validity of the statute as applicable to a cashier of a national bank, he should have done it by demurrer to the declaration, or by motion in arrest of judgment, after verdict, for insufficiency of the declaration. He had no right to require the court, on the trial before the jury, to entertain and decide a question outside the issue he had tendered, and it was not error in the county court to refuse to do it. This court, in hearing cases on exceptions, sits as a court of error to revise such questions only as were properly presented and involved in the decision of the county court; not such questions as might have been presented by different pleadings. The declaration having alleged that the defendant was cashier of a national bank organized and doing business under the laws of Congress, and having recited the statute of this State prescribing his duty and imposing the penalty for the breach of it, and the defendant having gone to trial on the general issue, and not having moved in arrest of judgment in the county court, the question of the sufficiency of the declaration, and consequently the question of the validity of the statute of the State as against the defendant, is not before us.

The evidence offered by the defendant and rejected by the county court was inadmissible. The fact that the bank kept such list of stockholders as required by the laws of Congress, and that the listers, on application to the bank, might have transcribed therefrom such stock as they deemed taxable, and that, *in the month of April* in the years in question, they did so, and that the same was duly taxed, cannot be accepted as a legal substitute for the duty imposed on the defendant, by the statute, of transmitting the list of stock or shareholders to the town clerk, "together with the amount of money actually paid in on each share on the first day of April in each year," "*on or before the fifteenth day of April* in each year." Affording the listers of a town the means of acquiring by their own labor and efforts, on application to the bank, the information which the statute requires the defendant to transmit to the town clerk, is not a compliance with the statute, even if they availed themselves of such means, as offered to be shown. If it is a compliance as to the town of Brattleboro, it must be so as to every other town in the State, however remote from the bank. Such a construction as the defendant's claim implies would render it necessary for the listers of each town in the State to apply to, and examine the

books or lists in, each national bank in the State, to ascertain whether any share or stockholders were taxable in their town. Nor can this evidence be admissible in mitigation of damages. If the defendant is liable at all, he is liable for the amount of the penalty imposed by the statute. The fact that the action is given only to a town in reference to which the defendant shall have been guilty of neglect or refusal to perform the duty imposed, does not make the penalty divisible, or apportionable, according to the amount of damage sustained by the particular town that may bring the suit. Whether the damage sustained by the particular town in any case is more or less than the prescribed penalty, the recovery can be neither more nor less than the penalty named in the statute. Such is the rule in reference to penal statutes, even where the right of action is in terms given only to the party aggrieved.

In this court, it is insisted on the part of the defence that if the defendant had performed the duty required of him by our State statute, it would have been no aid to taxation, because it is claimed our statute of 1865 above referred to, providing for the taxation of shares or stock in national banks, did not conform to the act of Congress relating to the taxation of shares in national banks. Whether it would be competent for the defendant to interpose such objection if it were well founded in fact, it is not material to decide, as the act of 1865 aforesaid provides that the stock and shares of all such banking associations shall be set in the lists and taxed in the same manner that the stock in the several banks in this State, which are chartered under the authority of this State, are liable to be taxed by the existing laws thereof. It is clear that this provision, taken in connection with the statute law existing at the time in question, in reference to taxing bank stock or share owned by individuals residing in this State, does not conflict with the act of Congress so far as relates to national bank shares owned by residents of this State. Whether there was any provision in the then existing State law relating to taxing bank stock or share owned by persons not residing in this State, or by the bank itself, which was invalid, is not material to the question involved in this case; for, even if so, it would not affect the validity of the provision for taxing shares or stock owned by individuals resident in the State. The statute therefore had a beneficial purpose of promoting legal taxation to be served by the performance of the duty required of

the defendant. There was no conflict between the State law and the act of Congress, in relation to the place of taxing such bank shares or stock.

None of the objections urged by defendant's counsel show any error in the rulings of the county court, and the judgment of that court is affirmed.